

No. 08-35528

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED FARM WORKERS, *et al.*

Plaintiff-Appellants,

v.

ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee,

GOWAN COMPANY,
MAKHTESHIM AGAN OF NORTH AMERICA, INC.,
and BAYER CROPSCIENCE LP,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON (04-0099-RSM)

BRIEF FOR DEFENDANT-APPELLEE

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LIST OF ACRONYMS

AZM	Azinphos-methyl (a pesticide)
APA	Administrative Procedure Act
EDF	Environmental Defense Fund
EPA	U.S. Environmental Protection Agency
FFDCA	Federal Food Drug and Cosmetic Act
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FQPA	Food Quality Protection Act
IREDD	Interim Reregistration Eligibility Decision
RED	Reregistration Eligibility Decision

JURISDICTIONAL STATEMENT

Plaintiff-Appellants United Farm Workers, Sea Mar Community Health Center, Pineros y Campesinos Unidos del Noroeste, Beyond Pesticides, Frente Indigena de Organizaciones Binacionales, and Arnulfo Lopez (collectively “the Farmworkers”) appeal from a district court order dismissing their complaint for lack of subject matter jurisdiction. The Farmworkers filed a timely notice of appeal on June 17, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether section 16(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136n(a), gave the district court subject matter jurisdiction over the Farmworkers’ claims.

INTRODUCTION

The Farmworkers filed a complaint in district court to challenge EPA’s decision to schedule gradual phaseout of a pesticide called azinphos-methyl, or “AZM,” pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Farmworkers

argued that EPA acted arbitrarily and capriciously by refusing to set a more aggressive phaseout schedule.

The district court dismissed the complaint for lack of jurisdiction. The court explained that, under FIFRA, a plaintiff who wants to challenge a decision that EPA made after a “public hearing” has to file a petition for review in a court of appeals, not a civil complaint in a district court. And under this Court’s case law, EPA conducted a “public hearing” within the meaning of FIFRA by soliciting and reviewing written comments and creating an administrative record that could be reviewed by a court of appeals. The Farmworkers appeal the district court’s judgment.

STATEMENT OF FACTS

A. The Federal Insecticide, Fungicide, And Rodenticide Act

FIFRA is the federal law that governs regulation of pesticide use in the United States. The statute generally prohibits distributing or selling any pesticide that has not been “registered” by EPA. 7 U.S.C. §§ 136a(a), 136j(a). EPA can register a pesticide if it finds, among other things, that the pesticide “will perform its intended function without

unreasonable adverse effects on the environment” and “when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.” *Id.* § 136a(c)(5)(C), (D). FIFRA prohibits anyone from using a registered pesticide in a way that is inconsistent with its EPA-approved labeling. *Id.* § 136j(a)(2)(G).

Registration of a pesticide generally remains effective until EPA cancels or suspends it. But FIFRA also requires EPA to periodically review registered pesticides. In 1988, Congress amended FIFRA to require a multi-phase reregistration process for all pesticides that were originally registered before November 1, 1984, and later amended that process again in 1996. 7 U.S.C. § 136a-1. After the review process, EPA issues a “reregistration eligibility decision” (RED) in which it determines whether the pesticide meets FIFRA’s no “unreasonable adverse effects” standard. *Id.* § 136a(c)(5)(C).¹ If EPA concludes that

¹ While EPA provides for extensive public participation in the FIFRA registration process, that process does not result in the issuance of a “rule” within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 551(4). Instead, the licensing proceedings that EPA conducts during registration and reregistration actions culminate in an “order” as that term is used in the APA, *id.* § 551(6).

the pesticide will have unreasonable adverse effects, the agency declares the pesticide “ineligible” for registration and can start the process of cancelling or suspending the existing registration. *Id.* § 136a-1(g)(2)(C), (D). Because certain elements of the review process can be time-consuming in cases where a pesticide shares common chemical properties with other pesticides, EPA has chosen to issue interim REDs (IREDs) pending completion of the final REDs.²

Sections 16(a) and 16(b) of FIFRA, 7 U.S.C. § 136n(a,b), determine where challenges to government action under the statute must be brought. They state, in turn:

(a) District court review. Except as otherwise provided in this subchapter, the refusal of the Administrator to cancel or suspend a registration or to change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the

² Under FIFRA, EPA must reassess food residue “tolerances” during the reregistration process. EPA issues those tolerances pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 7 U.S.C. § 136a-1(g)(2)(E). In determining tolerances, the FFDCA requires EPA to consider cumulative exposure to pesticides that share common chemical properties. 21 U.S.C. § 346a(b). The difference between an IRED and an RED is that EPA issues the latter only after it completes the time-consuming process of a cumulative exposure assessment.

Administrator by law are judicially reviewable by the district courts of the United States.

(b) Review by court of appeals. In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business, within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part. . . . Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. The court shall consider all evidence of record. The order of the Administrator shall be sustained if it is supported by substantial evidence when considered on the record as a whole. . . .

B. EPA's Interim Reregistration Eligibility Decision For AZM

This case concerns the pesticide azinphos-methyl, commonly called AZM. The United States Department of Agriculture (which administered FIFRA before Congress created EPA) initially registered AZM back in 1959. ER 20.

In 2001, EPA issued its IRED for AZM. ER 35. EPA concluded that because of environmental and safety concerns, it could only reregister AZM for certain uses, and that it would require new labeling statements and mitigation measures to protect human health and the

environment even for those uses. ER 43. EPA divided AZM uses into three groups. The first group included thirty-five specific uses including alfalfa, broccoli, cabbage, grape, and melon cultivation. EPA concluded that using AZM on these crops provided few benefits and that alternative pesticides were available. *Id.* It accordingly sought cancellation for all these uses. *Id.* For the second group, which among other uses included peaches and cotton, EPA determined that AZM use had to be phased out over a four-year period, which has since expired. *Id.*

The third group of AZM uses included the ones at issue here: brussels sprouts and nursery stock, almonds, walnuts, pistachios, apples, blueberries, cherries, pears and parsley.³ For this group of uses, EPA viewed its reregistration decision as a close case. Using AZM on

³ The original IRED divided AZM uses between the three groups in a somewhat different manner. *Compare* SER 619 *with* ER 43-44. This is because after EPA issued the IRED, it entered into a memorandum of agreement with the AZM registrants following its determination that certain IRED modifications were appropriate. In that memorandum, the AZM registrants agreed not to contest EPA's cancellation of certain AZM uses, and EPA agreed to modify the use groupings in the IRED in certain ways. The memorandum is described at <http://www.epa.gov/pesticides/reregistration/nrdc-report4.htm>.

these crops posed substantial risks, but yielded significant benefits as well. Notably, growers of these crops did not have good alternatives to AZM, and would suffer severely if they were forced to switch to alternative pesticides right away; EPA estimated that apple growers alone would suffer annual losses of up to \$84 million nationwide if forced to stop using AZM immediately. *See* SER 91. As a result, EPA determined that the benefits outweighed the risks for these ten uses, and reregistered AZM for them, limited to a four-year period ending in 2005. EPA told AZM registrants that if they wanted to continue selling or distributing the pesticide for these ten uses after 2005, they would have to submit renewal applications in 2004 that included additional safety and benefits data. EPA expected that more information about the risks and benefits of using AZM would be available after that time period, and there also would likely be better alternative pesticides to consider by then. *See* SER 620.

C. EPA's Renewal Of The AZM Registrations

By July of 2004, the AZM registrants submitted renewal applications to extend the time-limited registrations of AZM, *see* SER

620, and EPA began the process of reviewing them. In December of 2005, EPA published the ecological and grower impact assessments that it would use when reviewing these renewal applications. *See, e.g.*, SER 93 (“2005 Grower Impact Assessment of AZM on Sweet Cherries”). After soliciting and receiving public comment on those assessments, it issued a proposed decision on June 9, 2006, SER 358, and again sought public comment. EPA issued its final decision on November 16, 2006, in a document entitled “Final Decisions for the Remaining Uses of Azinphos-methyl.” SER 619-649. This decision document is the one that the Farmworkers challenged in their current action.

EPA’s final decision was that all the remaining uses of AZM must be phased out over time. For five crops (brussels sprouts, nursery stock, pistachios, walnuts and almonds), EPA determined that AZM use should end by 2007 or, in some cases, by 2009. SER 619. For the other five remaining crops (apples, pears, blueberries, cherries and parsley), EPA concluded that AZM still had significant benefits when compared to newer alternatives, and that an immediate or near-term cancellation of these uses would impose substantial costs on growers. EPA based

this determination, in part, on a conclusion that some of the newer alternatives to AZM might not yet be practical because international residue tolerances had not been fully approved.

At the same time, EPA found again that using AZM posed significant risks, and accordingly concluded that the remaining AZM uses (that is, for apples, pears, blueberries, cherries and parsley) should be phased out over a six-year period ending in 2012. SER 619, 628-649. The final decision called for certain mitigation measures to reduce the impact of using AZM during the phaseout period; those measures included worker education programs, no-spray zones around streams and buildings, and a program that would mandate gradual application rate reduction over the six-year period. SER 626-627, 632.

The six-year phaseout period EPA specified in its final November decision was longer than the four-year period the agency had originally proposed in June 2006. However, the longer phaseout schedule offered one major advantage: AZM registrants agreed not to challenge it. EPA concluded that because a consensus approach would avoid the need for formal cancellation proceedings and protracted litigation, important

aspects of the six-year phaseout plan would actually go into place sooner than if the agency tried to enact its original four-year phaseout plan in the face of opposition from registrants.

D. The Farmworkers' Lawsuit

The Farmworkers initiated their lawsuit back in January 2004, when they challenged the IRED for AZM by filing a complaint in district court. SER 1. The Farmworkers claimed that EPA had acted arbitrarily and capriciously in issuing the IRED. After EPA explained that it would be conducting renewed risk-benefit analyses before deciding whether to grant the AZM registrants' July 2004 renewal applications, the Farmworkers entered into a settlement agreement that stayed the district court proceedings until the agency completed its reevaluation.

The Farmworkers renewed their efforts to obtain a judicial remedy after EPA issued its final decision in November 2006. They filed a third amended complaint on April 27, 2007, the first count of which alleged that EPA's six-year extension was arbitrary, capricious, and contrary to FIFRA. ER 30. The Farmworkers moved for summary

judgment on that claim. EPA and various Intervenor pesticide manufacturers cross-moved as well. While EPA addressed the Farmworkers' claims on the merits, the Intervenor argued that the claims were not properly before the district court, and that the Farmworkers should instead have filed them in a Court of Appeals.⁴

Intervenors raised two alternative arguments to support their jurisdictional challenge. They claimed first that the Farmworkers' complaint really alleged that EPA had failed to take an action required by FIFRA, and therefore fell under 7 U.S.C. § 136a-1(m), which states that "[a]ny failure of the Administrator to take any action" required by FIFRA's reregistration provisions can be challenged by filing a petition

⁴ The Farmworkers correctly point out that trial counsel for EPA at one point responded to a question from the district court by stating that she agreed with the Farmworkers' jurisdictional position. That statement obviously cannot establish jurisdiction where none exists. And in any event, counsel was not aware of EPA's earlier representations in *Northwest Food Processors*. In that matter, EPA argued before the district court that for purposes of applying section 16(b), "the issue is whether the record relied upon by the agency is adequate for judicial review." SER 653 (EPA's Supplemental Memorandum in Support of Motion to Dismiss, *Northwest Food Processors v. Thomas* (D. Or. No. 88-641, June 16, 1988)). The undersigned counsel is still in the process of obtaining the appellate briefs filed before this Court in *Northwest Food Processors*.

for review in a Court of Appeals. The district court disagreed with this argument, noting that the plaintiffs did not allege that EPA had failed to perform a risk-benefit analysis, only that the agency had reached the wrong result. ER 12-13.

Intervenors also argued that the Farmworkers were challenging an order that EPA issued after a “public hearing” within the meaning of FIFRA Section 16(b), 7 U.S.C. § 136n(b), and that they should therefore have filed a petition for review in a Court of Appeals, rather than a district court complaint. Here, the district court agreed.

E. The District Court’s Dismissal Order

The district court recognized that this Court “laid out the test for whether or not a decision followed a ‘public hearing’” in *Northwest Food Processors Association v. Reilly*, 886 F.2d 1075 (9th Cir. 1989). ER 13. *Northwest Food Processors* held that the “public hearing” requirement of section 136n(b) “is satisfied when the EPA conducts proceedings in which interested parties are afforded an opportunity to present their positions by written briefs and a sufficient record is produced to allow judicial review.” 886 F.2d at 1077 (citing *EDF v. Costle*, 631 F.3d 922,

926-932 (D.C. Cir. 1980)). The district court noted that EPA had provided written notice and solicited comment on its proposed action, and created “a lengthy administrative record consisting of [its] determinations, public comments, and other supporting documentation.” ER 14. Moreover, the Plaintiffs’ record-review challenge could be resolved “without the need for further fact finding.” *Id.* (quoting *Costle*, 631 F.2d at 931). Accordingly, the court concluded that “proper jurisdiction lies in the court of appeals.” *Id.* (citing *National Grain Sorghum Producers Ass’n v. EPA*, 1996 WL 250327 at *6-8 (D.C. Cir. 1996)).

On May 16, 2008, the district court granted summary judgment against the Farmworkers. ER 16. This appeal followed.

STANDARD OF REVIEW

This Court conducts *de novo* review of an order dismissing a complaint for lack of subject matter jurisdiction. *Mangano v. United States*, 529 F.3d 1243, 1245 n.2 (9th Cir. 2008).

SUMMARY OF ARGUMENT

The district court was right to dismiss the Farmworkers' complaint for lack of subject matter jurisdiction. The Farmworkers are challenging a pesticide regulatory decision that EPA made after conducting a "public hearing." FIFRA therefore required them to petition for review directly in a court of appeals. Instead, the Farmworkers mistakenly filed a complaint in district court.

The Farmworkers argue that EPA did not conduct the sort of "public hearing" that they might have preferred; while the agency solicited and reviewed public comment, it did not take live testimony or allow oral argument. But almost twenty years ago, in *Northwest Food Processors Association v. Reilly*, this Court held that for purposes of determining where FIFRA jurisdiction lies, EPA conducts a "public hearing" whenever it allows people to present their positions in written submissions and creates a record that is amenable to judicial review. Here, EPA did both of those things.

The Farmworkers all but acknowledge that *Northwest Food Processors* controls this case. Their brief essentially argues that the

case and the authorities this Court relied upon in its opinion were wrongly decided as a matter of policy, and that this Court should either overrule it or conjure a distinction to avoid applying it here. But the Farmworkers exaggerate problems caused by giving appellate courts original jurisdiction over certain FIFRA cases; many federal statutes assign initial jurisdiction to the courts of appeals in record-review cases, and the courts handle them as a matter of routine. And, in any event, this panel has no authority to overrule *Northwest Food Processors*.

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION.

The district court properly recognized that this Court's decision in *Northwest Food Processors* controls this case. *Northwest Food Processors* holds that a plaintiff who wants to challenge a pesticide registration decision that EPA makes after soliciting written input and compiling an administrative record must file a petition for review pursuant to FIFRA Section 16(b), 7 U.S.C. § 136n(b), not a district court complaint pursuant to Section 16(a), 7 U.S.C. § 136n(a).

A. *Northwest Food Processors And EDF v. Costle* Have Already Conclusively Interpreted Section 16(b).

Northwest Food Processors considered a challenge by various commercial food processing companies to EPA's decision to cancel the registration of an herbicide called dinoseb. In 1986, EPA became concerned that dinoseb posed serious human health risks. The agency accordingly ordered an emergency suspension of the use or sale of dinoseb, and notified the public that it would begin formal proceedings to cancel the herbicide's FIFRA registration. *See Love v. Thomas*, 858 F.2d 1347, 1351 (9th Cir. 1988).

Under FIFRA, EPA's notice would effectively cancel any dinoseb registration unless the party holding the registration asked for an administrative hearing. Only two pesticide manufacturers did so. *See Northwest Food Processors*, 886 F.2d at 1076-1077. While the cancellation proceedings were still under way, these two companies settled with EPA, agreeing to voluntarily cancel their registrations in return for certain concessions, including the permission to use existing stocks of dinoseb. An administrative law judge approved the settlement, and the EPA Administrator affirmed it.

A coalition of food processing companies filed suit to challenge the settlement. In order to avoid jurisdictional problems, they filed both a complaint in district court *and* a petition for review in this Court. *Id.* at 1077. Eventually, the district court ruled in EPA's favor, and the food processors appealed. After consolidating the food processors' appeal with their petition for review, *id.*, this Court issued an opinion upholding the terms of EPA's cancellation decision. In that opinion, the Court first examined the proper source of its jurisdiction. The food processors argued that EPA had not held a "public hearing" within the meaning of FIFRA's section 16(b), 7 U.S.C. § 136n(b), so that this Court lacked jurisdiction. This Court rejected that argument by construing the phrase "public hearing" as follows:

We conclude that 136n(b)'s public hearing requirement is satisfied when the EPA conducts proceedings in which interested parties are afforded an opportunity to present their positions by written briefs and a sufficient record is produced to allow judicial review. *Costle*, 631 F.2d at 926-32; *see also Humane Soc'y of the United States v. EPA*, 790 F.2d 106, 110-12 (D.C. Cir. 1986). In the present case, the Administrator considered the ALJ's decision, together with various parties' written exceptions to the decision, objections to the settlement, and responses in support of the decision and settlement. The proceedings were conducted pursuant to notice. The Administrator prepared and filed a

comprehensive Final Order approving the settlement. The administrative record is adequate to permit judicial review. The proceedings qualified as a “public hearing” and we have jurisdiction. *Costle*, 631 F.2d at 932.

886 F.2d at 1077-1078 (citations modified). As this passage acknowledges, *Northwest Food Processors* adopted a reading of Section 16(b) that the D.C. Circuit set out in *EDF v. Costle*, 631 F.2d 922, 926-32 (D.C. Cir. 1980), and reaffirmed in *Humane Society v. EPA*, 790 F.2d 106, 110-12 (D.C. Cir. 1986).

Like *Northwest Food Processors*, *Costle* involved an EPA decision to limit the uses of a pesticide—a mite-killing chemical called chlorobenzilate—through a cancellation proceeding. When EPA notified the public of its proposed action, various groups submitted objections and asked the agency to hold hearings. An ALJ declined to hold a hearing and dismissed the objections on legal grounds, and the EPA Administrator affirmed. The groups then petitioned for review in the D.C. Circuit, alleging jurisdiction under Section 16(b) of FIFRA. An intervenor contended, however, that the proceedings before the ALJ and the Administrator did not count as a “public hearing,” and that jurisdiction properly lay in district court under Section 16(a).

The D.C. Circuit rejected the intervenor's arguments and held that it had jurisdiction under Section 16(b). Recognizing that FIFRA's text offered neither "an explicit or conclusive contextual definition of 'public hearing,'" the court turned to the legislative history for guidance. *Id.* at 928. It explained that before Congress enacted what is now Section 16(b) in 1972, FIFRA provided only for judicial review in the courts of appeals. What motivated the legislature to create an avenue for review in district court was its concern that direct appellate review "be based on an administrative decision with an adequate record." *Id.* at 931. Accordingly, a committee report describing the intended effect of Section 16(b) stated that the phrase "any order issued by the Administrator following a public hearing," was meant to encompass not just formal legal proceedings, but any matter that had "already been administratively heard and decided" by EPA. S. Rep. No. 92-838, 92d Cong., Sess. pt. II at 50-51 (1972), *reprinted in* 1972 USCCAN 3993, 4070. District court review was appropriate only where EPA had "refused to hold a hearing" at all, so that there was "no

record” that a court of appeals could review. *Id.* pt. I at 28, 1972 USCCAN at 4019.

Later history confirmed for the D.C. Circuit that appellate jurisdiction turned on “the availability of a reviewable record,” 631 F.2d at 931, and that the public hearing referred to in Section 16(b) “need not necessarily be adjudicatory in nature,” *id.* (quoting H.R. Rep. 94-668, 94th Cong., 1st Sess. 6 (1975), *reprinted in* 1975 USCCAN 1359, 1381); *see also* 631 F.2d at 931 (discussing rejection of proposed 16(b) amendments in 1977). Finally, the D.C. Circuit observed that Congress’ intent in enacting Section 16(b) was “in accord with sound judicial policy.” 631 F.2d at 931. In particular, it stated that where judicial review focuses on an agency’s administrative record, “requiring petitioners challenging regulations to go first to the district court results in unnecessary delay and expense.” *Id.* at 931 (quoting *Investment Co. Inst. v. Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977)).

B. EPA Gave The Farmworkers An Opportunity To Present Their Positions In Written Submissions.

In applying *Costle, Northwest Food Processors* set out a simple two-step test to determine whether EPA has conducted a “public hearing.” EPA must (1) afford parties “an opportunity to present their positions by written briefs,” and (2) compile “a sufficient record . . . to allow judicial review.” 886 F.2d at 1077. EPA did both of those things during the licensing proceedings for AZM.

With respect to the first part of the test, the district court correctly found that EPA solicited comments twice before it issued its AZM registration renewal decision. ER 10. First, on December 7, 2005, EPA took comment on its draft grower impact and ecological risk assessments. 70 Fed. Reg. 72,827 (Dec. 7, 2005). And second, EPA sought comment on its proposed decision on June 9, 2006. 71 Fed. Reg. 33,448. On both occasions, the plaintiffs filed written comments. *See, e.g.*, SER 110, 116, 582, 122, 385, 582, 597, 599, 608, 618. Moreover, EPA accepted some of the suggestions contained in these comments—notably, by adopting “no spray” buffer zones around inhabited buildings. SER 625-626.

The Farmworkers do not dispute that they had a chance to present their positions to EPA. Instead, they contend that *Northwest Food Processors* misread FIFRA, and that when Congress used the phrase “public hearing,” in Section 16(b), it had in mind “at least quasi-adjudicatory proceedings before EPA.” Br. 20.

As an initial matter, this flatly contradicts the legislative history of Section 16(b); a committee report on the Federal Pesticide Act of 1978 specifically stated that “[t]he public hearing need not be adjudicatory in character.” *Staff of S. Comm. On Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Federal Pesticide Act of 1978* at 164 (Comm. Print 1979). Moreover, in arguing that “an opportunity to comment, without more, cannot qualify as a public hearing,” Br. 20, the Farmworkers ask this Court to revisit *Northwest Food Processors* and redefine the meaning of the term “public hearing” by reference to the requirements of FIFRA section 6(d), 7 U.S.C. § 136d(d). *See* Br. 21, 23. This argument only rehashes a claim raised and rejected in *Costle*; there, the D.C. Circuit stated that the fact that Section 6(d) of FIFRA “establishes certain types of hearing proceedings

and procedures does not definitively prove that these are the only ‘public hearings’ able to serve as predicates of appellate court review.” 631 F.2d at 927; *see also id.* at 928 (“it is ... not surprising that different sections of the same statute might use the word in different ways”).

The Farmworkers’ attack contradicts *Humane Society* even more squarely. There the D.C. Circuit held that EPA conducted a “public hearing” within the meaning of FIFRA Section 16(b) when it invited parties “to submit written comments.” *Humane Society*, 790 F.2d at 111-112. The Farmworkers erroneously suggest that the petitioners in *Humane Society* had participated in an “extensive proceeding” before an administrative law judge, Br. 28 (quoting 790 F.2d 106, 111-112 & n.49), that included “live hearings” and “testifying witnesses.” Br. 29. But the proceeding that the D.C. Circuit described this way in *Humane Society* was not the one it was reviewing. *See* 790 F.2d at 109. Instead, it was a proceeding whose record EPA had incorporated into the record for the narrower decision that the *Humane Society* petitioners challenged. In describing the decision that *was* at issue, the D.C. Circuit said only that “interested parties were invited to submit written

comments.” 790 F.2d at 111-112. It discussed the volume of the submissions in the earlier proceeding purely to illustrate the adequacy of the record for review. *Id.* at 112 (describing the record as “wholly adequate for appellate review”).

Northwest Food Processors cited both *Costle* and *Humane Society* approvingly in setting out its definitive interpretation of Section 16(b). Since the D.C. Circuit rejected the Farmworkers’ arguments in those opinions, this Court should reject them as well.

C. The Record That EPA Compiled During Its AZM Licensing Proceedings Is More Than Adequate To Allow Direct Review In The Court Of Appeals.

With respect to the second part of the *Northwest Food Processors* test, there can be little doubt that EPA compiled a “sufficient record” to allow judicial review. EPA’s notice-and-comment proceedings for AZM reregistration generated almost 700 documents, including EPA risk evaluations and impact assessments, comments from interested parties, supporting scientific studies, and, of course, the final decisions that the Farmworkers wish to challenge. Together, those documents stack up to thousands of pages; the agency’s index alone is over fifty

pages long. SER 33-88. This record would have been more than adequate to allow a court of appeals to review EPA's decisions without further fact-finding—just as in *Costle*, “few, if any, further insights could [be] gained through further proceedings,” 631 F.2d at 932.

The Farmworkers do not attempt to argue that the record that EPA compiled in making its AZM decisions is insufficient to allow review.⁵ They contend only that the *Northwest Food Processors* court was wrong to include this inquiry in its jurisdictional test. According to the Farmworkers, “the length of an administrative record cannot be the touchstone for determining FIFRA jurisdiction without essentially rewriting the statutory command.” Br. 29; *see also* Br. 20 (“the length of an administrative record cannot be the touchstone for jurisdictional assignment”). But that argument directly contradicts *Costle*, where the D.C. Circuit said that as a matter of judicial policy, “it is the

⁵ The Farmworkers do note that their original complaint contained claims “challenging EPA’s use of non-public data in the AZM IRED and denying the public the right to comment on that data.” Br. 22. They suggest that a court of appeals might not have been able to grant them full relief on these claims. Whatever the merit of that argument, the Third Amended Complaint does not challenge the IRED at all, and makes no similar allegations about the November 16, 2006, final decision.

availability of a record for review and not the holding of a quasi-judicial hearing which is now the jurisdictional touchstone.” 631 F.2d at 931 (citation omitted). Similarly, Farmworkers argue that “the existence of a lengthy record does not mean that there has been an order following a public hearing,” Br. 29, but that contradicts *Northwest Food Processors*, which says that the “public hearing” is satisfied, in part, when “a sufficient record is produced to allow judicial review.” 886 F.2d at 1077.

The Farmworkers continue their attack on *Northwest Food Processors* by arguing that “setting the length of the administrative record as [a] factor to determine jurisdiction is an unworkable standard,” because “plaintiffs would be forced to guess whether their particular record was adequate.” Br. 30. But they point out the solution to this problem themselves: a litigant who is not sure whether to file his claim in a district or appellate court can avoid dismissal by doing both. Other FIFRA litigants have not hesitated to do so. *See, e.g., Northwest Food Processors*, 886 F.2d at 1077 (challengers “simultaneously filed a complaint in district court and a petition for

review in this court”); *AMVAC Chemical Corp. v. EPA*, 653 F.2d 1260, 1264 (1980) (affected party that was “uncertain as to intent of Congress” filed both “petitions for review . . . as well as a complaint”). Such caution is part and parcel of the practice of law. In any event, the Farmworkers’ proposed interpretation of Section 16(b) would hardly create a jurisdictional regime that is more “clear and simple” than the one created by *Northwest Food Processors*. Br. 31. Among other things, it would divide the governing law of the D.C. Circuit and the Ninth Circuit, so that jurisdiction would depend on which circuit the claim was filed in.

D. The Farmworkers Exaggerate The Difficulties Posed By Section 16(b) Jurisdiction.

Finally, the Farmworkers claim that *Northwest Food Processors*, *Costle*, and *Humane Society* were wrongly decided as a matter of judicial policy. Br. 31-34. They say that by reading Section 16(b) broadly, those cases force the Courts of Appeals to stoop to “distilling the important issues” and “sorting through hundreds or thousands of pages of administrative record.” Br. 32. But these tasks are properly the job of the parties, not the Court. *See, e.g.*, Circuit Rule 17-2

(threatening sanctions against parties for including “irrelevant materials” in the excerpts of record). And while Farmworkers worry that direct review might force Courts of Appeals to take judicial notice of various facts and make rulings about the proper scope of the administrative record, Br. 33, this Court is quite familiar with such tasks. *See, e.g., Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186, 1192 n.4 (9th Cir. 2008) (taking judicial notice); *Davis v. EPA*, 348 F.3d 772, 778 n.4 (9th Cir. 2003) (correcting administrative record). Countless statutes provide for direct review of administrative action in the Courts of Appeals; the Farmworkers’ arguments ignore the fact that such review is a matter of routine.

Separately, Farmworkers suggest that this Court’s broad reading of Section 16(b) in *Northwest Food Processors* unjustly applies the 60-day filing requirement of that section. Br. 24, 34. They say that a 60-day deadline might be appropriate for parties to an adjudication, but not for citizens who seek judicial review of administrative decisions. According to Farmworkers, such “[n]on-parties may not quickly have notice of the final agency decision; they will not be familiar with [the]

administrative docket for the decision; and they will not have had the chance to distill the legal issues for judicial review.” Br. 24. But the sixty-day time period for seeking review of a FIFRA is hardly anomalous. *See, e.g.*, 42 U.S.C. § 7607(b) (establishing 60-day period for seeking review of Clean Air Act rulemaking).

E. The Farmworkers Are Wrong To Suggest That *Costle* Supports Their Jurisdictional Argument.

The Farmworkers’ last set of arguments about Section 16(b) use various statements from the merits discussion in *EDF v. Costle* to support their jurisdictional claims. Br. 35-36. The district court correctly dismissed these arguments. ER 16.

Recall that the petitioners in *Costle*—Environmental Defense Fund (EDF) and Florida Citrus Mutual—were challenging EPA’s denial of their respective requests for administrative hearings during proceedings to cancel the registration of chlorobenzilate. *See above* at pp. 18-19. (EDF believed that the terms of EPA’s cancellation were too lenient; Florida Citrus Mutual thought the opposite. *Costle*, 631 F.2d at 925.) After concluding that Section 16(b) gave it jurisdiction over both claims, the D.C. Circuit went on to discuss the merits of each.

Id. at 932-937. The court concluded that EDF was not entitled to a hearing because FIFRA affords “no hearing right” to persons who oppose a pesticide cancellation decision on the ground that it has “permissive” portions that are too lenient. *Id.* at 935. In explaining this merits conclusion, the D.C. Circuit made three statements that the Farmworkers use here to support their jurisdictional arguments.

The first statement comes from an analogy the *Costle* court made to support its merits holding. The D.C. Circuit said that if EPA had already issued a pesticide registration that included “permissive” provisions identical to the ones EDF wanted to challenge, and then rejected a later request by EDF to start *new* proceedings to revisit those permissive provisions, “EDF’s only remedy would be in the district court.” *Id.* at 935. Of course, that is not the situation now before the Court; here, the Farmworkers are not challenging EPA’s rejection of a request to begin cancellation proceedings. Instead they are challenging the *substantive result* of a decision EPA made on the AZM registrants’ applications to continue their time-limited registrations.

The second statement comes from a discussion in *Costle* concerning the general pattern under FIFRA whereby EPA “decisions regulating more strictly may be challenged in administrative hearings [whereas] those regulating less strictly may not.” *Id.* at 937. In that discussion, the D.C. Circuit stated that “persons seeking more stringent regulation may sue in the district court without first enduring an administrative hearing.” *Id.* Here, however, the court was referring to persons who seek more stringent regulation *through a petition for a cancellation proceeding that is then denied*, not persons who seek more stringent regulation by challenging the results of a completed registration renewal proceeding.

The third quote that the Farmworkers rely upon actually undercuts their argument. The D.C. Circuit noted that the cancellation notice at issue in *Costle* left EDF “better off” than it had been before, because the provisions of the notice that restricted certain uses were favorable to EDF, and “the decision to retain registration for other uses [was] still subject to district court review.” *Id.* at 937. What the D.C. Circuit meant by that last statement was that EDF was free to *petition*

EPA again for cancellation of the remaining registered uses; if EPA refused, EDF could challenge “the refusal of the Administrator to cancel . . . a registration” under Section 16(a). The Farmworkers could conceivably do the same here; what they cannot do is file a district court complaint to challenge a FIFRA order issued after notice-and-comment proceedings.

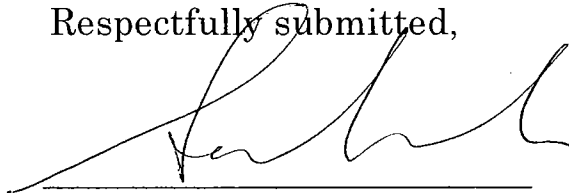
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The Farmworkers appear to have made a fatal mistake in filing their claim against EPA. It does not matter that they could have avoided it: jurisdiction “is not a question of equity.” *Breed v. Hughes Aircraft Co.*, 253 F.3d 1173, 1179 (9th Cir. 2001). None of the Farmworkers’ arguments can override the rules that federal courts must follow their precedents and abide by statutory limits on their jurisdiction.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ronald J. Tenpas', is written over a horizontal line.

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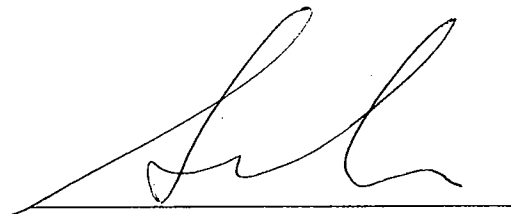
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STATEMENT OF RELATED CASES

Defendant-Appellee is not aware of any related cases.

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7) AND CIRCUIT RULE 32-1
FOR CASE NO. 08-35528**

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 6,121 words.

A handwritten signature in black ink, appearing to read 'Sankar', is written over a horizontal line.

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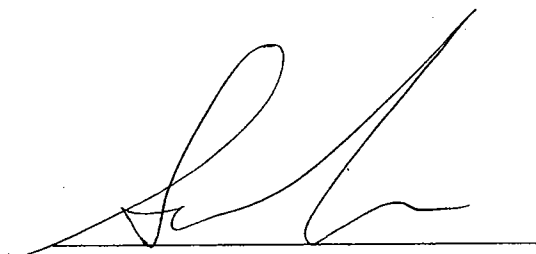
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